IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
March 27, 2007 Session

STATE OF TENNESSEE v. BOBBY DALE PARRIS

Appeal from the Criminal Court for Bradley County
No. M-04-844 Carroll Ross, Judge

No. E2006-00893-CCA-R3-CD - Filed May 23, 2007

The defendant, Bobby Dale Parris, pleaded guilty to the second degree murder of his wife, Sandy Parris. *See* T.C.A. § 39-13-210 (2006). After an evidentiary hearing, the trial court sentenced the defendant to serve 20 years in the Department of Correction at 100 percent after finding two enhancement factors and no mitigating factors. *See* T.C.A. §§ 40-35-113 & -114 (2006). On appeal, the defendant claims that the sentence is excessive. Without reaching this issue, we remand this case for sentencing under the 1989 Sentencing Act and for correction of a clerical error in the judgment.[1]

Tenn. R. App. P. 3; Judgment of the Criminal Court is Vacated and Remanded.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and J.C. MCLIN, JJ., joined.

James F. Logan, Jr., Cleveland, Tennessee, for the Appellant, Bobby Dale Parris.

Robert E. Cooper, Jr., Attorney General & Reporter; Leslie E. Price, Assistant Attorney General; Steve Bebb, District Attorney General; and Kristie Luffman, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

At the April 10, 2006 sentencing hearing, the State and the defendant stipulated to the defendant's pretrial confessions and to certain information in the presentence report, including the defendant's prior misdemeanor criminal history for various drug and alcohol related convictions.

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[1] The judgment incorrectly lists Tennessee Code Annotated section 39-13-206 as the conviction offense. It should reflect the proper Code section 39-13-210, second degree murder. *See* T.C.A. § 39-13-210 (2006).

The victim's sister, Sharlene Mikel,[2] testified that her sister's murder devastated her family. She further testified that the defendant "was always drunk" when she saw him. On the night of the murder, Ms. Mikel spoke with the victim at about 8:15 p.m. During the conversation, the victim asked for a second phone number where Ms. Mikel could be reached in case of necessity.

The victim's other sister, Darelen Pippinger, also testified that on the night of the shooting, September 13, 2004, she was admitted to Erlanger Hospital for surgery on her two broken feet. She refused the surgery to stay with the victim, who had arrived at the hospital via Life Force due to the gunshot wound to her head. Ms. Pippinger stayed with the victim until her death on September 16, 2004.

The victim's sister-in-law, Connie Mikel, testified that she had known the victim for 21 years. She testified that the defendant had physically and verbally abused the victim in the past. Ms. Mikel also testified that due to the victim's death, Ms. Mikel's daughter has had to move back into her house, her daughter suffers from nightmares, and Ms. Mikel's husband "tears . . . up" everyday.

The victim's youngest son, Tommy Hesson, testified that his mother and the defendant married when he was six years old. He testified that he was "extremely close" to his mother because she was both a father and a mother to him. Mr. Hesson also testified that he developed a bond with the defendant over the years and that he cared about the defendant. He testified that the victim and the defendant argued frequently, and several weeks prior to the shooting they argued about getting a divorce.

On the night of the shooting, Mr. Hesson was visiting the victim, and the defendant arrived home intoxicated. The victim and the defendant began arguing, and the victim informed Mr. Hesson that she did not need him to stay with her and said that "it was the same old thing." Thus, he left the house, but shortly after he left, he passed police cars driving toward the victim's house. Mr. Hesson testified that everyday he regretted leaving the house because if he had not left, he possibly could have intervened and prevented the shooting.

Mr. Hesson also testified that he forgave the defendant for what he did, but that no amount of jail time could replace his mother.

The defendant's brother, Steve Parris, testified on the defendant's behalf that the defendant had a drinking problem at the time of the shooting. After the shooting and while on bond, the defendant lived with Mr. Parris. Mr. Parris testified that the defendant worked, helped with expenses, stopped drinking alcohol and smoking marijuana, and expressed remorse for what he had done.

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[2]The transcript of the evidence lists the names as "Charlene"; however, an exhibited letter from this witness lists the name as "Sharlene." Thus, we will use this spelling.

The defendant testified that he pleaded guilty to second degree murder even though defense counsel informed him that it was reasonable that he could be found guilty of a lesser included offense. He testified that he never blamed anyone else for his wife's murder but claimed that his drinking alcohol played "a big role in it."

On the night of September 13, 2004, he testified that he and his wife argued and struggled. He then left the room, retrieved one of his guns, and shot his wife in the head. After the shooting, he called 9-1-1. The defendant testified that he did not intentionally hurt his wife that night, and he denied physically and verbally abusing her prior to September 13.

At the sentencing hearing, the defendant apologized to the victim's family. He further testified that he has suffered every night for what he did.

On cross-examination, the defendant admitted that he had been convicted of several alcohol and drug related misdemeanor offenses. He admitted that he continued to commit these type of offenses even after being convicted.

After all testimony, the trial court sentenced the defendant to 20 years in the Department of Correction, and the defendant filed a timely notice of appeal.

First, the defendant claims on appeal that although the trial court "properly considered" enhancement factor (9), that the defendant possessed or employed a firearm in committing the offense, *see* T.C.A. § 40-35-114(9), the court had "no basis for [its] opinion that the legislature inserted this provision because of a person's constitutional right to bear arms and that such abuse [a]ffects 'everyone's rights [to] have guns and keep them for legal and lawful purposes.'" Second, the defendant argues that the trial judge failed to apply any mitigating factors, namely that "the defendant was remorseful, cooperated with authorities[,] and acknowledged responsibility," *see* T.C.A. § 40-35-113(13) (If appropriate for the offense, mitigating factors may include, but are not limited to . . . [a]ny other factor consistent with the purposes of this chapter.").

When there is a challenge to the length, range or the manner of service of a sentence, it is the duty of this court to conduct a de novo review of the record with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d) (2006). This presumption is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The burden of showing that the sentence is improper is upon the appellant. *Id*. In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely de novo. *Id*. If appellate review, however, reflects that the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The sentencing court must consider (1) the evidence, if any, received at the trial and

the sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct involved, (5) evidence and information offered by the parties on the enhancement and mitigating factors, (6) any statements the defendant wishes to make in the defendant's behalf about sentencing, and (7) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-210(a), (b) & -35-103(5) (2006).

At the sentencing hearing, the trial court found and applied the following enhancement factors to the defendant's conviction:

> (1) The defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range, [and]
>
> . . . .
>
> (9) The defendant possessed or employed a firearm, explosive device, or other deadly weapon during the commission of the offense.

T.C.A. § 40-35-114(2), (9) (2006).

The defendant argued that he was "remorseful, cooperated with authorities[,] and acknowledged responsibility." He also argued that although alcohol was a "big factor" in committing the crime, he had neither consumed alcohol nor ingested drugs since the murder. The trial court, however, declined to apply these mitigating factors. *See id*. § 40-35-113(13). Thus, the court sentenced the defendant to 20 years in the Department of Correction to be served at 100 percent. *See id*. § 40-35-501(i).

On appeal, the defendant concedes that our review is de novo with a presumption of correctness. He does not challenge the application of enhancement factor (1) and even states that enhancement factor (9) was "properly considered." The defendant insists, however, that the trial court improperly failed to find any mitigating factors, and his sentence should, therefore, be reduced to the statutory minimum of 15 years.

We need not reach this issue, however, because the trial court incorrectly sentenced the defendant using the current sentencing law,[3] and we remand for resentencing under the 1989 Sentencing Act. The defendant shot his wife on September 13, 2004, and the court sentenced him in April 2006. Because he committed the offense prior to the current sentencing law's effective date, June 7, 2005, and because the defendant did not properly waive his ex post facto rights, the 1989

[3]The new sentencing scheme that became effective for offenses committed on or after June 7, 2005, and provided that "defendants who are sentenced after June 7, 2005, for offenses committed on or after July 1, 1982, may elect to be sentenced under the provisions of the act by executing a waiver of such defendant's ex post facto provisions." *See* 2005 Tenn. Pub. Acts ch. 353 § 18; T.C.A. § 40-35-102 (2006), Compiler's Notes.

Sentencing Act applies to his case. *See State v. Rex Aaron Nelson*, No. E2006-01333-CCA-R3-CD, slip op. at 7-8 (Tenn. Crim. App., Knoxville, May 3, 2007).

Upon remand, under the 1989 sentencing scheme, the court should begin at the presumptive sentence, *see* T.C.A. § 40-35-210(c) (2003) ("The presumptive sentence for a Class A felony shall be the midpoint of the range."), and in this case, that presumptive sentence is 20 years because the range of punishment for a Class A felony in Range I is 15 to 25 years, *see id*. § 40-35-112(a)(1). Moreover, if there are enhancement and mitigating factors, "the court must start at the midpoint of the range, enhance the sentence within the range as appropriate for the enhancement factors, and then reduce the sentence within the range as appropriate for the mitigating factors." *Id*. § 40-35-210(e).

Also, the use of the pre-2005 sentencing scheme requires the trial court to consider the defendant's Sixth Amendment rights. *See Gomez v. Tennessee*, – U.S. –, 127 S. Ct. 1209 (2007) (vacating *State v. Gomez*, 163 S.W.3d 632 (Tenn. 2005)); *Cunningham v. California*, – U.S. – , 127 S. Ct. 856 (2007); *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000). Thus, the *Cunningham-Blakely* regime requires that enhancement factor (9), the employing of a firearm, be found by a jury. *See State v. Mark A. Schiefelbein*, No. M2005-00166-CCA-R3-CD, slip. op at 2 (Tenn. Crim. App., Nashville, Mar. 7, 2007) (holding Tennessee's pre-2005-revision sentencing law was "just as determinative as Washington's scheme [as denounced in *Blakely*] – because the sentence was fixed by statute in the absence of fact-finding not embraced in the jury's verdict – and just as mandatory, as well – because the judge was not authorized to depart from the presumptive sentence unless he or she found certain facts not embraced in the jury's verdict ").

Accordingly, the sentencing order is vacated and the cause is remanded for further proceedings.

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JAMES CURWOOD WITT, JR., JUDGE